Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

INTRATEC RESOURCE CO., L.L.C.,

Petitioner,

v.

EL PASO CORPORATION, EL PASO TENNESSEE PIPELINE CO., EPEC GAS LATIN AMERICA, INC., and EPEC BAJA CALIFORNIA CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the decision of the Court of Appeals holding that petitioner's alleged status as a consultant precludes petitioner's standing to maintain an private antitrust action under 15 U.S.C. § 15 is in error in the light of conflicting decisions of the United States Court of Appeal for the Third Circuit and the United States Court of Appeal for the Ninth Circuit?

Whether the anti-consultant rule of law applied by the Court of Appeals is improper because it predicates "competitor" standing in antitrust cases on a comparison between the plaintiff's range or portfolio of business activities and the range or portfolio of business activities of the defendant or defendants, thus measuring standing by the characteristics of the alleged competitors rather than the actual ability of plaintiff to compete and deprive the defendant of business in the marketplace?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Intratec Resource Co., L.L.C., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF JURISDICTION

The court of appeals entered its final order denying rehearing on November 19, 2001 (App. C). The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 4 of the Clayton Act (15 U.S.C. § 15) provides in relevant part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. . . ."

Section 1 of the Sherman Act (15 U.S.C. § 1) provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Section 2 of the Sherman Act (15 U.S.C. § 2) provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . ."

Section 7 of the Clayton Act (15 U.S.C. § 18) provides in relevant part that:

> No person shall acquire, directly or indirectly, the whole or any part of the share capital [or] . . . acquire the whole or any part of the assets of another person . . . where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT OF THE CASE

A. IRC's Energy Project Development Efforts In and Related to Baja California.

This case is focused on natural gas related energy project development efforts of petitioner Intratec Resource Co. L.L.C. (IRC)[1] in, and related to, the Baja California area of Mexico in the period from 1988 through 1997. In 1988, IRC entered into a development agreement[2] with the Oregon utility, Portland General Electric, to seek the permission of

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1. IRC is a Colorado limited liability company formed in 1994. It is the successor in interest to a joint venture of its two members, Intratec S.A. de C.V., a Mexican company based in Mexico City, and a Colorado corporation, Resource Planning Corporation (RPC). For convenience, "IRC" is used to cover the activities of these predecessors and affiliates of IRC.

2. The Baja California power project venture is memorialized in a "Project Agreement" and "Amended Project Agreement" between a PGE subsidiary and an IRC affiliate, Resource Planning Corp. R. 3344-74.

the Mexican government to develop a power generation project in the Tijuana area of Baja California. This business plan was based on Portland General's experience selling surplus power in the California market. The parties believed that a project sited in Baja California could also profitably sell power in the California market.

Despite favorable economics, IRC's plan presented formidable obstacles. To gain the permission of the Mexican authorities for a privately owned and financed project of this type presented a special challenge because the energy sector of the Mexican economy was (and for the most part still is) controlled by Mexico's state owned energy monopolies, Pemex and the Federal Electricity Commission (CFE). Any privately financed project would require the consent or acquiescence of these powerful state institutions. IRC believed this was not an insurmountable obstacle, however, because economic growth and rising population in Baja California and areas along the Texas border[3] was outstripping Mexico's ability to finance and build new power generation capacity. Moreover, the CFE's existing plants fueled by fuel oil created significant cross-border pollution that had become a diplomatic problem with the United States.

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3. A key electric project opportunity in the Texas border area was at Samalayuca, which had power stations that served Ciudad Juarez, and were just across the border from El Paso, Texas. Affiliates of respondent El Paso Corporation sought to develop a new natural gas fueled electric power project at Samalayuca and a new cross border natural gas pipeline to serve the project. As discussed more fully below, El Paso prevented the California utility company Sempra Energy from competing for the Samalayuca pipeline project by agreeing to refrain from competition with Sempra for similar projects to supply Baja California. *See* part C.3, below.

In the 1988-91 period IRC did extensive development work with and lobbying of Mexican government and utility officials, but by 1991 it had become clear that Mexico and Pemex could not provide an economic supply of natural gas to Baja California. The fundamental problem was that Baja California has no indigenous natural gas reserves and had no pipeline connections with the rest of Mexico and with the United States.[4] This problem led IRC to begin looking for fuel supplies in the United States and Canada for export to Baja California and for transportation arrangements to get the supplies to Baja California.[5]

Acquisition of gas supplies in United States and Canadian markets was relatively easy because the Federal Energy Regulatory Commission (FERC) had largely deregulated the commodity or "merchant" phase of the natural gas business by forcing natural gas pipelines to restrict their business to pipeline transportation services.[6] This bifurcation of the business, however, required that

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4. The initial plan presented by IRC and its collaborators, Portland General and the construction firm ABB, relied on importation of propane of liquified natural gas (LNG) to Baja California by sea. Affidavit of Lance Astrella ¶ 13 (R. 3370). This plan that had little economic merit but catered to Mexico's traditional preference for satisfying its fuel needs from domestic sources.

5. *Id.* ¶¶ 13, 16 (R. 3370-69)

6. There are many reported cases describing the purposes, history, merits and controversy surrounding the FERC's "unbundling" policy. This history and reasons for these policies are detailed in *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1121-27 (D.C. Cir. 1996) (affirming in part and remanding to FERC Order 636-B (61 FERC (CCH) ¶ 61,007 (1993)).

transportation arrangements be made separately from natural gas purchase and sale transactions. This bifurcated structure presented special problems for Baja California because of the necessity of developing and constructing new pipeline facilities.The FERC continued to control pipeline development and construction projects as well as pipeline transportation operations because of the natural monopoly characteristics of gas transportation.[7] IRC thus sought and found the former Tenneco Inc. (now respondent El Paso Tennessee Pipeline Co.)[8] a pipeline "partner" capable surmounting the economic and regulatory barriers to development and construction of such new pipelines.

B. The IRC-Tenneco Relationship.

IRC's solution to the problem was to enter into business arrangements with Tenneco, which was an active developer of pipeline projects in the Western United States. Tenneco had developed and constructed the Kern River Pipeline from Wyoming to the Bakersfield area of central California. Kern River was the first new pipeline constructed to serve the California market since the 1960's. Tenneco also intended to expand Kern and to begin construction on its Altamont

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7. *See generally, United Distribution Cos. v. FERC*, 88 F.3d 1105, 1121-27 (D.C. Cir. 1996) (affirming in part and remanding to FERC Order 636-B (61 FERC (CCH) ¶ 61,007 (1993)). This prohibition of the right to sell gas by pipelines was regarded by the FERC as necessary to prevent distortion of natural gas commodity markets arising from the "natural monopoly" power inherent in the pipeline transportation function. *United Distribution*, 88 F.3d at 1122.

8. Respondent El Paso Corporation became the controlling shareholder of Tenneco through a merger agreement signed June 19, 1996, and completed December 12, 1996.

Pipeline Project, which would bring Canadian gas supplies from the Canadian border to Kern and through Kern to California and other Southwest markets.[9] IRC's experience and plans for Baja California made IRC a natural fit with Tenneco because it needed new markets to support construction of its development projects.

IRC's and Tenneco's complementary interests led them to enter into two independent but related types of contracts. First, Tenneco began development of a new "Baja Pipeline Project" to link Kern River facilities in central California with the Baja California border.[10] Tenneco and IRC entered into a consulting agreement in which IRC agreed to continue its project development work in Mexico and Baja California in a representative capacity for Tenneco.[11]

Second, IRC lined up gas supplies in Montana and Canada and entered into firm transportation agreements for 95,000 Mcf/day of capacity with Altamont.[12] These arrangements gave IRC the opportunity to profit from gas sales to Baja California independently of its consulting compensation from Tenneco. The consulting agreement

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9. Affidavit of Dennis Peseau ¶ 8 (R. 7302).

10. Astrella Aff. ¶ 16 (R. 3369).

11. The first such agreement was executed in 1992. In March, 1994, the first agreement was terminated and replaced with a new consulting agreement between IRC and a newly organized Tenneco subsidiary called Tenneco Baja Corporation, which is now respondent EPEC Baja California Corporation. This entity is referred to here as Tenneco Baja.

12. Peseau Aff. ¶ 8 (R. 7302).

specifically recognized the independent business interest of IRC in gas sales and supply, but imposed a non-competition covenant on IRC's supply business. This covenant prevented IRC from using pipelines competitive with the facilities of the proposed Baja Pipeline Project.[13] IRC could not do business with Tenneco's pipeline competitors. Thus, as long as IRC's Consulting Agreement with Tenneco remained in force, IRC's natural gas fuel opportunities were intertwined with the success or failure of Tenneco's Baja Pipeline development project.

C. Competition for the Baja California Market.

Intratec and Tenneco were not the only companies seeking business opportunities in the Baja California market. Their pipeline competitors were the principal "incumbent" pipelines and distributors in Southern California and the Southwestern United States. The key competitor was a joint venture of Southern California's gas distribution utilities, Southern California Gas Company (SoCal Gas) and San Diego Gas & Electric Co (SDGE).[14] The other potential competitor was respondent El Paso, which operates the principal interstate pipeline system connecting producing areas of Texas and New Mexico with consumption markets in Southern California, Arizona and New Mexico.

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13. Consulting Agreement ¶ 5.3 (R. 3369)

14. The joint venture was called "Project Vecinos." At the time of its formation, SoCal and SDGE were independent. In October, 1996, however, their parent companies entered into a merger agreement. The merger was completed in June 1998 and the parent company renamed Sempra Energy. For convenience, these entities are sometimes referred to as "Sempra," or "the California utilities" or "Project Vecinos."

The Baja California competition began in earnest with the passage in 1995 of privatization legislation eliminating the Pemex monopoly over the natural gas transportation and distribution in Mexico. Mexico also set up a competitive bidding program to offer natural gas transportation and distribution projects to private and foreign investors. The first of these projects to be offered was to be a distribution franchise in Mexicali, Baja California near the California and Arizona borders. Bids for this project were to be submitted in June, 1996. Additionally, in May, 1996, Mexico issued a request for proposals from electric power developers for new and refitted power projects at Rosarito, on Baja California's Pacific coast near Tijuana. Mexico also opened, on August 1, 1996, a bidding competition for a new pipeline project to connect El Paso's pipeline in Texas with a new power station at Samalayuca in the border area near El Paso's headquarters in El Paso, Texas.

The key liability facts occurred in 1996 and related to the Baja California and Samalyuca projects. Quite simply, in 1995 and the first half of 1996 before Tenneco agreed to merge with El Paso, IRC and Tenneco went forward with their competitive plans for Baja California. However, Tenneco's competitive effort ceased without disclusure to IRC or release of IRC from its non-competition covenants with Tenneco after the merger agreement was signed and announced on June 19, 1996.

1. Mexicali.

Tenneco submitted its bid for the Mexicali franchise to the Mexican authorities on June 3, 1996 and the bid was pending at the time of the Tenneco-El Paso merger announcement of June 19, 1996. R 3258. The bids were

opened August 12, 1996 and Tenneco came in second to the Project Vecinos joint venture of the California utilities. R 1717.

2. Rosarito

After this loss, IRC specifically asked Tenneco whether the Mexicali loss meant Tenneco would cease competition for the Rosarito power project or gas supply opportunity. IRC received assurances from Tenneco that it still intended to compete for these project opportunities. R 6861-60. Bound as it was to Tenneco by non-competition and confidentiality agreements in its Consulting Agreement, IRC accepted these assurances and refrained from seeking alternative deals with other pipeline and energy partners. Moreover, Tenneco's assurances were plausible because Tenneco's internal economics showed that Tenneco could quote a base rate of $.49/MMBtu for pipeline service to the Rosarito power plant and estimated the probable rate of $.68/MMBtu rate by the California utilities.[15]

Despite Tenneco's assurances to IRC, Tenneco sat on the sidelines from August until the completion of the merger in December, 1996 for reasons unexplained at the time. However, El Paso and Tenneco documents show that in the September-November, 1996 time frame CFE was actively

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15. In fact, Tenneco's advantage may have been greater. Notes on a fax from CFE to El Paso state that "SoCal" (Sempra) was quoting $.50 "border to border" i.e. from the California-Arizona border to the international border near San Diego. This was $.01 higher than Tenneco's proposed rate *at the plant gate* even without including the cost of of additional transport in Mexico from the border to the plant gate. It appears CFE correctly regarded Sempra as "not cost effective." R. 7858.

soliciting a long term pipeline service and gas supply bid from El Paso to compete with Sempra.[16] Despite this, El Paso only provided CFE with a non-competitive "preliminary" quotation that priced transportation alone at $.65/MMBtu, some $.16/MMBtu above Tenneco's proposed rate. What happened?

3. Rosarito for Samalyuca *Quid Pro Quo.*

What the evidence shows is that El Paso had taken "operational control" over Tenneco's international projects on August, 1996 and assigned Tenneco's lead developer, John Holcomb, to El Paso's bidding team for the Samalayuca pipeline project competition. Under the CFE bid specification for this project, only Sempra and El Paso were qualified bidders for the project. R 6022.

The evidence shows that El Paso and Sempra decided to withdraw from competition with each other at Samalyuca and El Paso traded away Tenneco's Baja Project. This evidence is based on documents from a secret, conspiratorial meeting held September 25, 1996 at a motel near the Phoenix, Arizona airport. R 7312-11. The parties prepared an agenda for the meeting which shows that those in attendance included Warren Mitchell and Richard Baish, the presidents respectively of SoCal Gas and El Paso Natural Gas, Ed Guiles, the executive vice-president of San Diego

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16. The key documents are in the record at R. 7860-7852. An internal memorandum of an El Paso Marketing official dated October 14, 1996 stated: "CFE is seeking assistance from El Paso, as well as other major energy suppliers in the shaping of its Request for Proposal (RFP) for gas supply for the repower of its rosarito C.T power plant." (R. 7856). The memo noted the plant's demand would be for 120,000 MMBtu/day with peak requirements of 180,000 MMBtu/day.

Gas & Electric, and Al Clark, a senior vice-president of El Paso for Transportation Affairs. *Id.*

The "agenda" covered four items quoted below:

- discussion of service to Samalayuca Generating Plant;
- discussion of joint venture/alliance for distribution service in Northern Mexico;
- discussion of potential Tenneco asset realignment with PEI; and
- discussion of opportunities resulting from electric industry restructuring.

R 3311.

Mr. Clark's notes and the testimony of the parties to the meeting and other El Paso witnesses establish that the reference to "service to Samalayuca generating plant" reflected an agreement by the parties to bid jointly for the Samalayuca pipeline service. R 6044, 6016. This was tantamount to a rigged bid because, under the bidding qualifications established by CFE for the Samalyuca pipeline project, only Sempra and El Paso were qualified bidders for the project. R 6022. The second agenda item concerning "joint venture/alliance for distribution service in northern Mexico" plainly supports the inference that the parties were considering and decided to cease competition between

themselves with respect to Mexico's project and to divide up the emerging markets of Northern Mexico.[17]

The key item, however, on the issue of antitrust standing is the reference to "Tenneco asset realignment." Quite simply, Tenneco had only two significant assets in the western United States.[18] These were its Baja Pipeline Project and its Altamont Pipeline Project. This evidence supports the inference that shows that El Paso and Sempra cut an unlawful market allocation deal in which Sempra withdrew from the Samalayuca bidding competition, and El Paso bargained away Tenneco's project development plans for Baja California, in which IRC had substantial economic interest, in exchange in a market allocation conspiracy.

D. Proceedings Below

El Paso initiated this litigation by seeking a declaratory judgment that respondent Tenneco Baja had no post termination obligations to IRC. IRC brought its antitrust

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17. This inference is supported by the undisputed fact that even though El Paso backed out of the joint venture agreement for the Samalayuca pipeline, SoCal did not bid on it even though it had a significant advantage over El Paso. Ultimately El Paso's bid was the only one and won by default. R 6022, 6010, 5085-84. Similarly, when the Rosarito pipeline project was put out for public bidding two years later in Sempra's "backyard", neither El Paso nor any other party bid on it and Sempra, like El Paso won without competition. R 5085-84.

18. Tenneco had sold its interest in Kern River in 1995. Altamont, however, was a fully certificated pipeline and Tenneco had successfully applied to FERC in early 1996 to extend its construction deadline to November, 1998.

claims as a counterclaim and third party complaint adding Tenneco and El Paso and asserting antitrust claims based on merger violations under section 7 of the Clayton Act and for conspiracy with Sempra to allocate markets under section 1 of the Sherman Act and to monopolize under section 2 of the Sherman Act. El Paso moved to dismiss the antitrust claims under Rule 12(b) on the ground that IRC's alleged lack of antitrust standing. The motion to dismiss was denied. When IRC moved to compel discovery on antitrust issues, El Paso responded by moving for summary judgment on the same theory of lack of standing and sought a protective order to prevent merits discovery on antitrust issues. IRC responded to both motions and submitted responsive affidavits and evidence to the summary judgment motion, but moved for further discovery under Rule 56(f).

The district court referred the discovery motions to the magistrate judge, who granted IRC's motion to compel and denied El Paso's motion to preclude antitrust discovery. El Paso produced documents in January 1999, and significant deposition discovery began in February, 1999. By stipulation approved by the Court, the discovery cutoff in the case was extended to May 7, 1999. However, on April 19, 1999, with discovery still going full tilt, the district court entered an order granting partial summary judgment to El Paso. This was a no evidence decision based on IRC's alleged lack of standing. *See* Appendix B at 12a.

IRC filed motions to vacate or for reconsideration of the partial summary judgment in early May, 1999 and tendered additional evidence. On December 30, 1999, the district court granted summary judgment for El Paso granting all relief requested by the El Paso parties and denying all relief requested by the Intratec parties. The district court also denied without comment or discussion IRC's motion to vacate or

reconsider the partial summary judgment based on the considerable evidence summarized here that two pipeline companies — each regulated as natural monopolists — successfully conspired to rig the course of cross border pipeline and gas export development to Mexico.

On January 18, 2000, the Intratec parties filed timely motions for a new trial to which the El Paso parties filed responses on May 23, 2000. A hearing was held on May 25, 2000, on Intratec's motion for new trial but the motions for new trial were denied by memorandum order dated June 13, 2000. The Intratec parties filed timely notices of appeal on July 11, 2000.

The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the district court in an unpublished decision dated October 4, 2001. IRC filed a timely motion for panel rehearing, which was denied in an unpublished order dated November 19, 2001.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Interpretation of the Antitrust Injury Doctrine and Matters of Antitrust Standing Under 15 U.S.C. § 15 Conflicts with Precedents of the Third and Ninth Circuits.

A. The Anti-Consultant Rule Applied by the Court of Appeals Conflicts With Third and Ninth Circuit Precedent.

The entire reasoning of the court of appeals as it relates to the antitrust claims is as follows:

> We affirm for essentially the reasons stated by the trial court. We are persuaded that the antitrust claims . . . suffer from lack of antitrust injury. . . . Appellants raise no genuine issue of fact regarding any injury suffered as a result of the asserted illegal diminution of competition. They were consultants to Tenneco, a relationship that by the end of 1976 (sic) was terminable at will on 30 days notice.

Appendix A.

Although the reasoning of the court of appeals is terse, the court clearly construes IRC's "consultant" status as precluding, as a matter of law, any finding that IRC has suffered antitrust injury. Such a general "anti-consultant" rule both conflicts with the precedent of other circuits and is erroneous.

The "anti-consultant" rule is in conflict with Ninth Circuit precedent beginning with the case of *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991). There the plaintiffs were also "consultants." The business of the consultants was helping Yellow Pages advertisers save money on ads. GTE, the defendant and Yellow Pages publisher, damaged the business of the consultants by rescinding their rights to place ads for their clients. 951 F. 2d 1150. GTE argued to the district court that GTE, as publisher, was not a participant in the same market as the consultants of providing "independent advice to reduce Yellow Pages costs" and thus that the consultants and GTE were not "technical antitrust competitors." The district court granted summary judgment to GTE on this basis, but the Ninth Circuit rejected the "technical antitrust competitor" approach. 951 F.2d at 1162.[19] For purposes of antitrust injury "competitors are those who have actual or potential ability to deprive each other of significant levels of business." *Id.* A plaintiff meets the antitrust injury requirement if it contributes to "the essential discipline on producers and sellers of goods to provide the consumer with a better product at lower cost." *Id.*

Subsequent cases in the Ninth Circuit continue to adhere to the *Yellow Pages* standard and analysis of antitrust injury. *E.g. American Ad Management, Inc. v. GTE*, 190 F.3d 1051

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19. Yellow Pages addressed separately the question of "antitrust standing" as opposed to "antitrust injury." This Court reversed the district court's holding that a consultant's injury was derivative of its client's injuries and that the causes of action of the consultants belonged to their customers. 951 F.2d at 1162, 1163. It held that the antitrust injury test did not preclude standing for "derivative" injuries, but required only that the injury be "close in the chain of causation." *Id.* at 1162.

(9th Cir. 1999). Of particular importance, however, are decisions of the Third Circuit that first distinguished *Yellow Pages* in favor of a strict "consumer" or "competitor" rule and then reconsidered and rejected this test. First, in *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 235 (3d Cir. 1997), the Third Circuit denied that a telemarketing service provider was a competitor of "consulting pharmacists" in SmithKline's established chain of distribution. *Barton* found the telemarketer was not a "competitor" because the pharmacists could fill customer orders, while the telemarketer forwarded orders to others. *Barton* sought to distinguish *Yellow Pages* on the ground that the consultants were in the same market as the defendant, but *Barton* did not consider the essential issue of whether the plaintiff could deprive the defendant of business.

The Third Circuit has subsequently reexamined and backed away from an absolute requirement of "competitor" or "consumer" status as in *Barton*. *See Carpet Group International v. Oriental Rug Importers Association, Inc.*, 227 F.3d 62, 76 (3d Cir. 2000). In *Carpet Group* the plaintiff sought to foster direct sales between foreign rug makers and American retailers, bypassing the established methods of incumbent rug importers as middlemen, and suffered retaliation from the importers. The plaintiff plainly did not operate in the defendants' market niche, but just as plainly could be shown to produce a "cross elasticity" between his own business and that of the defendants. The plaintiff was thus found to have standing because the plaintiff sought to "forge a link in a chain of sale" in competition with the market incumbents. *Id.* at 77-78 (*citing Crimpers Promotions Inc. v. Home Box Office*, 724 F.2d 290 (2d Cir. 1983), *cert. denied*, 467 U.S. 1252

(1984) (Friendly, J.)). As with *Yellow Pages,* what matters is not the specific characteristics of alleged competitors the ability of the plaintiff to deprive the defendant of business.

B. The District Court's Rigid "Consumer" or "Competitor" Standard Is Also In Conflict With Precedent of Other Circuits.

The court of appeals decision also stated that it affirmed the summary judgment for "essentially the reasons stated by the trial court."[20] The trial court decision rested solely on the ground that IRC failed to satisfy the "antitrust injury" requirement. App. B at 9a. The opinion of the district court correctly traced this concept to this Court's *Brunswick* decision,[21] but appended to the antitrust injury a specific "consumer or competitor" as in *Barton, supra.* The district court reasoning was as follows:

> The court's focus must be upon competition in the allegedly restrained market. "Restraint in the market affects consumers or competitors in the market; as such, they are the parties that have standing to sue."

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20. The trial court applied the three part standard articulated in *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997). Under the test and antitrust plaintiff must show (1) injury in fact in the sense of proximate cause, (2) "antitrust injury" and (3) "proper plaintiff" status. The district court regarded the first and third elements of the *Doctor's Hospital* standard as "not in dispute".

21. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). *Brunswick* limits the treble damages remedy to plaintiffs who suffer injury "of the type the antitrust laws were intended to prevent and that flow[] from that which makes the defendant's acts unlawful." *Id.* at 489.

App. B 10a (*quoting Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988)). With this focus on restraint *in* the market affecting consumers or competitors *in* the market, the district court construed "antitrust injury" to require IRC to have a "business or property interest *in* the market of exportation of gas *and* gas transportation services to the state of Baja California in Mexico." App. B. Applying this test, the district court granted a "no evidence" summary judgment to El Paso.

The district court decision here shares the overstated premise of *Barton*. As in *Barton,* the district court imposed on "competitor" status a requirement of an exact functional match between the business activities of the plaintiff and the defendant "competitor." Thus the district court required IRC, like the defendant, El Paso to own a pipeline or have a contract to buy one. The court ignored evidence in IRC's affidavits showing that IRC had lined up gas supplies and could "deprive El Paso of business" buy selling such gas in support of Tenneco's pipeline project. *See* pp. 6-7, above.

Similarly, on the "consumer" side, the district court discerned no evidence that IRC owned natural gas consumption facilities *in* Baja California or had contracted to buy any, so "consumer" status was lacking as well. In this the district court ignored evidence that IRC had acted to become a "consumer" of Tenneco's pipeline services by agreeing to be a shipper or arrange shipments to Baja California on Tenneco's pipeline project, *when it came into existence*. *See* pp. 6-7 above. In this instance the court unfairly ignored that the defendants' elimination of Tenneco as a pipeline competitor, damaged IRC's interest as a customer of the Tenneco Baja project.

II. The Questions Presented Are Important and Should be Examined by This Court.

Baja California was an emerging market during the period relevant to this complaint. Like the plaintiff in *Carpet Group*, IRC worked both with Tenneco and independently to develop a new "chain" of natural gas distribution to Baja California in competition with the incumbent utilities, El Paso and Sempra. The rigid formalism applied below miss this key point. The cases cited above are only a few of the many that may be found in the lower courts that show general confusion of standards as to the meaning of such concepts as "antitrust injury" and antitrust standing.

As the Ninth Circuit has noted, the resort of the lower courts to the "consumer" or "competitor" status tests is traceable to a non-dispositive case by case factor mentioned in this Court's decision in *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983). *See American Ad, supra*, 190 F.3d at 1057. Rigidly applied, this dictum is in conflict with the Court's declaration a year earlier that section 4 of the Clayton Act

> does not confine its protections to consumers, or purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Blue Shield v. McCready, 457 U.S. 465, 472 (1982). Only this Court can reconcile the conflicting readings of *Associated General* and *Blue Shield*. The "anti-consultant" and/or "consumer" or "competitor" standards applied in this case are plainly out of harmony with *Blue Shield* particularly, and in conflict with other circuits.

The courts below applied the wrong standard in this case and, in so doing, have reached a result that is patently inconsistent with the purposes and intent of the antitrust laws. As noted above, the mechanical tests applied by the district court and the court of appeals end up measuring IRC's standing by the characteristics of the pipeline monopolists who conspired to injure competition in this case. As a result, the courts have limited "competition" and standing to monopolists. Only Tenneco, now owned by El Paso, even arguably would have standing to challenge El Paso's conduct. In this way, the rules applied in the lower courts allow issues of antitrust injury or standing to prevent the merits of a serious antitrust case from being examined.

The record in this case shows that IRC has standing to complain of El Paso's conduct because it suffered injury to its "business or property" as a result of the El Paso Sempra conspiracy and because of the El Paso — Tenneco merger. The elimination of Tenneco as a competitor for the Rosarito pipeline and gas supply project *directly* prevented IRC from earning its multimillion dollar "Development Fee" which could only be earned if Tenneco competed for the project. Similarly, while Tenneco was sidelined in the Fall of 1996 by El Paso, IRC was sidelined too because the Tenneco non-competition covenant prevented IRC from seeking out pipeline partners other than Tenneco.

Whether IRC is regarded as having standing because it was "intertwined" with Tenneco, or because it was a "link in the chain" of competition for the Baja California, protection of *competition*, which is the overriding duty of courts in antitrust cases, demands that the serious evidence of restraints of trade and injury to competition in issue here be examined on their merits.

CONCLUSION

For the reasons given, the Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED OCTOBER 4, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-20640

EPEC GAS LATIN AMERICA, INC;
EPEC BAJA CALIFORNIA CORPORATION,

Plaintiffs-Appellees,

versus

INTRATEC SA DE CV; INTRATEC RESOURCE CO., L.L.C.,

Defendants-Third-Party Plaintiffs-Appellants,

versus

EL PASO ENERGY CORPORATION;
EL PASO TENNESSEE PIPELINE CO.,

Third-Party Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
(97-CV-2126)

Before REAVLEY, HIGGINBOTHAM, and PARKER, Circuit Judges.

Appendix A

PER CURIAM:*

We affirm for essentially the reasons stated by the trial court. We are persuaded that the antitrust claims of Intratec S.A. de C.V., defendants and third-party plaintiffs below, appellants here, suffer from lack of antitrust injury and that summary judgment was also properly granted on appellants' other claims. Appellants raise no genuine issue of fact regarding any injury suffered as a result of the asserted illegal diminution of competition. They were consultants to Tenneco, a relationship that by the end of 1976 was terminable at will on 30 days written notice.

Relatedly, we conclude, as did the district court, that there is no evidence of a breach of the consulting agreements. Whether or not Tenneco intended to proceed with the Baja project after the bid for Mexicali failed in August 1996, any failure to disclose breached no contractual provision or misled appellants. Appellants concede they would have had no claim if they had been informed in August of 1996 that the Baja project was not to be. Some, such as Ewell Muse, thought the project was dead and others, such as Mr. Holcomb, thought it was still worth pursuing. What is undisputed is that the Baja project was on the "back burner" and Mr. Ruben Mereles of Intratec Resources knew that. Mr. Mereles, for example, participated in two conference calls, on November 5th and November 21st, to discuss the Tenneco strategy for Mexico and the Baja pipeline was on neither

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

agenda — this during the time appellants maintain was critical to the future of the Baja project. Appellants never requested release from their covenants not to compete, although they knew that the Baja project was not being pursued throughout the fall of 1996 and Tenneco Baja terminated the 1994 and 1996 contracts under their 30-day notice provisions by letters dated February 10, 1997.

We find no merit to appellees' arguments and affirm the summary judgment granted by the district court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED APRIL 19, 1999 AND ENTERED APRIL 20, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION N0. H-97-2126

EPEC GAS LATIN AMERICA, INC.
and EPEC BAJA CALIFORNIA CORPORATION,

Plaintiffs,

v.

INTRATEC S.A de C.V. and
INTRATEC RESOURCE CO., L.L.C.,

Defendants and Third-Party Plaintiffs,

v.

EL PASO ENERGY CORPORATION
and EL PASO TENNESSEE PIPELINE CO.,

Third-Party Defendants.

Appendix B

ORDER

Pending before the Court is Third-Party Defendants' Motion for Partial Summary Judgment on Antitrust Claims pursuant to 15 U.S.C. §§ 2 and 18 (Document #83). After considering the motion, submissions, and applicable law, the Court has determined that the motion should be granted.

Facts

In the late 1980's, the Mexican government began discussing plans to modernize and expand its electricity-generating capacity in the state of Baja California, Mexico. Tenneco Gas Pipeline Company (Tenneco) formed a subsidiary corporation, Tenneco Baja, to explore the possibility of developing a natural gas transportation pipeline to serve the anticipated power plants in Mexico. An affiliated company with Tenneco, Tenneco power, simultaneously explored the possibility of developing the power plants themselves.

In 1992, Intratec Resource Company (Intratee Resource) entered into a contractual agreement with Tenneco Baja to promote the "Baja Project." The "Baja Project" pursuant to contract, was defined as United States pipeline facilities extending from Tenneco Baja's Kern River Pipeline in the Bakersfield area of California to the United States border with Baja California, Mexico. The parties agreed that Intratec Resource would consult with Tenneco Baja in the pursuit of developing a natural gas transportation pipeline to Mexico. In 1994, Tenneco Baja and Intratec Resource executed a new consulting agreement that superseded and canceled the 1992 prior agreement.

Appendix B

The 1994 consulting agreement specified the terms of the consultation agreement and the payment of services. Included in the agreement was a non-competition covenant preventing Intratec Resource from consulting for Tenneco Baja's competitors relative to the pipeline project, but leaving Intratec Resource free to pursue opportunities related to electric projects and fuel supply. The 1994 consulting agreement gave no guarantee to Intratec Resource that the pipeline under consideration would ever be built. In addition, Intratee Resource had no proprietary rights with regard to Tenneco Baja's pipeline project.

In 1995, the Mexican government enacted legislation and regulations eliminating the legal barriers to entry into the Mexican market. Intratec Resource worked with Tenneco Baja and Tenneco lower (the gas pipeline division and electric power generation division of Tenneco) in the planning and representation of these projects with the Mexican government. Tenneco Baja and Tenneco Power discussed with Intratec Resource the idea of a proposal to the Mexican government that the project be structured as a concurrent bid for transportation, gas and an electric power plant, *i.e.*, an integrated project. The idea was that Tenneco Baja, with Intratec Resource's assistance, presented to Mexico's Department of Energy, the economic and other data necessary to justify and sell the integrated project concept. However, there was never a formal agreement reached between Intratec Resource and Tenneco Power directed to this end.

In December of 1996, El Paso Energy Corporation (El Paso Energy) formally acquired Tenneco by merger. On February 10, 1997, Tenneco Baja (now known as El Paso

Baja California Corporation) formally exercised its right to terminate the 1994 consulting agreement with Intratec Resource.

El Paso Energy thereafter filed suit against Intratec Resource on June 20, 1997, in this Court, to obtain a judicial declaration of what their legal rights and duties were pursuant to the consulting agreement with Intratec Resource. In response, Intratec Resource asserted a breach of contract counter-claim along with antitrust claims against El Paso Energy. El Paso Energy requests this Court to consider its motion for summary judgment on the antitrust claims asserted by Intratec Resource pursuant to 15 U.S.C. §§ 2, and 18 against El Paso Energy.

Summary Judgment Standard

Pursuant to Fed.R.Civ.P. 56, summary judgment is appropriate if the movant establishes, through the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). When the moving party has carried its summary judgment burden, the respondent "must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The respondent must produce evidence, mot merely argument, in response to a movant's properly supported motion for summary judgment. *Foval v. First Nat'l Bank of Commerce*, 841 F. 2d 126, 129 (5th Cir.1988). The introduction of a mere scintilla of evidence is not sufficient to avoid summary judgment. Rather, the non-movant must come forward with sufficient evidence

that, if admitted at trial, a verdict in his favor would be possible. *Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 343 (5th Cir.1990).

Intratec Resource, the non-moving party, has responded to Defendant El Paso Energy's motion by presenting pleadings on file; excerpts from the affidavits of Lance Astrella and Ewell H. Muse; and the depositions of John Holcomb, Dennis Peseau and Alvin L. Alexanderson; accompanied with the expert reports of Howard D. Lutz.

Antitrust Claims

Intratec Resource asserts that El Paso violated 15 U.S.C. § 18 when El Paso Energy merged with Tenneco. 15 U. S. C. § 18 (a) provides that "no person engaged in commerce or any activity affecting commerce shall acquire . . . the whole or any part of the assets of another person engaged also in commerce . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." According to Intratec Resource, the merger contributed to and resulted in the monopoly of the transportation of gas to Baja California, Mexico as evidenced by the cancellation of Tenneco Baja's proposal for the construction of the gas pipeline to Mexico. In turn, this allegedly left El Paso Energy's competitor, Pacific/Enova, free to construct a gas pipeline to Mexico without any competition from Tenneco Baja.

Intratec Resource further claims that El Paso Energy violated 15 U.S.C. § 2 by conspiring to monopolize the market of delivering gas to Baja California, Mexico via a pipeline system. 15 U.S.C. § 2 prohibits any person from

monopolizing or attempting to monopolize any part of trade or commerce. Intratec Resource alleges that because Pacific/ Enova is the largest purchaser of gas from El Paso Energy, El Paso Energy wanted to make sure that Pacific/Enova would be the winner of the bid from the Mexican government to construct the pipeline. In this way, El Paso Energy is assured that Pacific/Enova will continue buying gas from them in the future. Hence, Intratec Resource claims that they were effectively squeezed out of the market to construct a gas pipeline to Mexico when El Paso Energy canceled Tenneco Baja's proposed gas pipeline to Baja California, Mexico.

Analysis

This court must address the issue of whether Intratec Resource has standing to sue pursuant to 15 U.S.C. §§ 2 and 18. Standing to pursue an antitrust suit exist only if a plaintiff shows: 1) injury-in-fact, an injury to the plaintiff proximately caused by the defendants' conduct; 2) antitrust injury; and 3) proper plaintiff status, which assures that other parties are not better situated to bring suit. *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance Inc.*, 123 F.3d 301, 305 (5th Cir. 1997) (citing *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1341 (5th Cir. 1988)). The first and third elements of the standing inquiry are not in dispute. Hence, the court must address only the second element; whether Intratec Resource has produced sufficient evidence of an antitrust injury to survive summary judgment on the claim that Intratec Resource has no standing to sue pursuant 15 U.S.C. §§ 2 and 18.

Appendix B

An antitrust injury is an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). The court's focus must be upon competition in the allegedly restrained market. *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988). "Restraint in the market affects consumers and competitors in the market; as such, they are the parties that have standing to sue." *Id.* "The antitrust injury must be to the plaintiff's business or property, that is, whether the plaintiff has a stake in the litigation." Robert L. Haig, Business and Commercial Litigation in Federal Courts § 53.3, 128 (1998). To be a competitor or consumer for antitrust standing purposes, it must be shown that the consumer or competitor has a business or property interest in the relevant market. Conversely, if plaintiff has no business or property interest, then plaintiff is not a competitor or consumer for antitrust purposes. In such case, plaintiff would have no standing to sue under the antitrust statutes. Therefore, Intratec Resource must produce evidence that it has a business or property interest in the market of exportation of gas and gas transportation services to the state of Baja California in Mexico to show that it is a competitor or a consumer within the meaning of the antitrust statutes.

Intratec Resource has failed to show that it is a competitor in the export of gas and gas transportation services to the state of Baja California in Mexico because Intratec Resource has no business or property interest in this market. The evidence shows that Intratec Resource owns no gas pipeline facilities that could serve Baja California, has executed no contracts to build or purchase any gas pipeline facilities that could serve Baja California, and has not bid on any contracts to build or purchase any gas pipeline facilities that could serve Baja

California. Intratec Resource was never prepared to build a gas pipeline to Baja California. Furthermore, Intratec Resource cannot claim a proprietary interest in Tenneco Baja's proposed pipeline because the 1994 consulting agreement specifically disclaims any proprietary interest for Intratec Resource. It only grants Intratec Resource the right to receive a consulting fee, which would be calculated as a percentage of Tenneco Baja's fixed construction costs. Payment of a consulting fee alone does not create a partnership or joint venture interest upon which to claim a proprietary interest. For these reasons, Intratec Resource is not a competitor in the Baja California gas transportation market. Therefore, Intratec Resource has no standing to sue as a competitor pursuant to 15 U.S.C. §§ 2 and 18.

Intratec Resource also has failed to show that it is a consumer in the export of gas and gas transportation services to the state of Baja California in Mexico because Intratec Resource has no business or property interest in Baja California, Mexico. Just as Intratec Resource never owned any pipeline facilities to transport natural gas to Baja California, Intratec Resource also never owned any facilities to consume gas transportation services in Baja California. Intratec Resource never executed or bid on any contract to build or operate a power plant. The evidence shows that Intratec Resource lacked the ability to design, build, finance or operate a power plant itself, and it never executed any contract under which any third party agreed to perform any of those tasks. Intratec Resource never sold or purchased natural gas in Baja California, and never executed any contracts to either buy or sell natural gas in Baja California. For these reasons, Intratec Resource is not a consumer in the

Baja California gas transportation market. Therefore, Intratec Resource has no standing to sue as a consumer pursuant to 15 U.S.C. §§ 2 and 18.

Intratec has failed tō produce sufficient evidence that creates a material fact issue concerning whether they were a competitor or consumer pursuant to 15 U.S.C. §§ 2 and 18. Intratec Resource's unsuccessful direct participation in a competitive process cannot be converted into an antitrust injury. Therefore, the plaintiff has not adequately asserted facts to support a finding of an antitrust injury in this case. Consequently, Intratec Resource has no standing to sue under the antitrust laws and El Paso Energy's motion for summary judgment must be granted.

Accordingly, the Court hereby

ORDERS that Third-Party Defendants' Motion for Partial Summary Judgment on Antitrust Claims pursuant to 15 U.S.C. §§ 2 and 18 (Document #83) is GRANTED.

SIGNED at Houston, Texas, on this 19 Day of April, 1999.

s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 19, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 00-20640

EPEC GAS LATIN AMERICA INC;
EPEC BAJA CALIFORNIA CORPORATION

Plaintiffs-Appellees

v.

INTRATEC SA DE CV; INTRATEC RESOURCE CO, LLC

Defendants-Third Party Plaintiffs-Appellants

v.

EL PASO ENERGY CORPORATION;
EL PASO TENNESSEE PIPELINE CO

Third Party Defendants-Appellees

Appeals from the United States District Court for the Southern District of Texas, Houston

Appendix C

ON PETITION FOR REHEARING

Before REAVLEY, HIGGINBOTHAM, and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge